

SERVICE DATE – DECEMBER 20, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42113

ARIZONA ELECTRIC POWER COOPERATIVE, INC.

v.

BNSF RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY

Digest:¹ The Board reinstitutes the rate prescription in this proceeding for 2015, using 2015 financial data. The Board continues to hold this case in abeyance for 2016-2018, to allow the asset markup resulting from the Berkshire Hathaway, Inc., acquisition of BNSF Railway Company to be fully reflected in the variable costs and the rate prescription. When the 2016 financial data becomes available, the Board will prescribe the rate for that year. Once the asset markup is fully incorporated, the Board will reinstitute the rate prescription for 2017-2018.

Decided: December 18, 2017

In this decision, the Board reinstitutes the rate prescription in this proceeding for 2015, using 2015 financial data.

BACKGROUND

In 2008, Arizona Electric Power Cooperative, Inc. (AEPCO) filed a complaint challenging the reasonableness of the joint rates established by BNSF Railway Company (BNSF) and Union Pacific Railroad Company (UP) for unit train coal transportation service. On November 22, 2011, after finding that BNSF and UP have market dominance over those movements, and that their rates exceeded the level defendants needed to charge to earn a reasonable return on the full replacement cost of the facilities used to serve AEPCO, the Board prescribed the maximum lawful rate that the carriers could charge, which amounted to 180% of the variable cost of providing the service. Ariz. Elec. Power Coop. v. BNSF Ry., NOR 42113 (STB served Nov. 22, 2011).

On May 2, 2011, in Western Coal Traffic League—Petition for Declaratory Order, Docket No. FD 35506, the Western Coal Traffic League (WCTL) filed a petition asking the

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

Board to adjust BNSF's Uniform Railroad Costing System (URCS) costs due to the 2010 purchase of BNSF by Berkshire Hathaway, Inc. (Berkshire). WCTL requested that, for 2010 and subsequent years, the Board exclude the write-up in BNSF's net investment base attributable to the difference between the book value and the price that Berkshire paid to acquire BNSF, and to make corresponding changes in BNSF's annual URCS depreciation calculations.

On July 25, 2013, the Board issued a decision in the WCTL proceeding that prohibited BNSF from revaluing its railroad assets to reflect the write-up during the years 2010, 2011, and 2012, while also holding that BNSF must mark up its rail assets in accordance with Generally Accepted Accounting Principles (GAAP) for 2013 and beyond, subject to a four-year transition period. W. Coal Traffic League—Pet. for Declaratory Order (WCTL Order), FD 35506, slip op. at 2, 28-29 (STB served July 25, 2013).

As a result of that proceeding, AEPCO petitioned the Board to reopen the prescription in this proceeding. Subsequently, the Board found that substantially changed circumstances justified reopening this proceeding and, citing the WCTL proceeding, temporarily lifted the prescriptive effect of the rate prescriptions in this case. Ariz. Elec. Power Coop. v. BNSF Ry. (January 2012 Decision), NOR 42113, slip op. at 2 (STB served Jan. 20, 2012).

On May 14, 2015, the Board issued a decision in this proceeding reinstituting the rate prescription for 2009-2013 and requiring the parties to use corrected URCS data when calculating the maximum lawful rate that BNSF may charge for the years 2010-2013, or if there are no corrected URCS costs, the most recent available URCS costs for the corresponding year. Ariz. Elec. Power Coop. v. BNSF Ry. (May 14 Decision), NOR 42113, slip op. at 6-7 (STB served May 14, 2015) clarified by Ariz. Elec. Power Coop. v. BNSF Ry., NOR 42113, slip op. at 4 (STB served Sept. 2, 2015). The May 14 Decision similarly ordered the parties to use a Board-recalculated Western Region URCS applying the most recent, corrected BNSF URCS data when calculating the maximum lawful rate for the same years. The May 14 Decision also explained that the WCTL Order required BNSF to reflect the asset markup from the Berkshire purchase in its rates for the four-year period beginning in 2013. Finally, the May 14 Decision continued to hold the proceeding in abeyance for 2014-2018, to allow the asset markup resulting from the Berkshire acquisition of BNSF to be fully reflected in BNSF's variable costs and rate prescription. The Board stated that, for 2014-2016, when each year's financial data became available, it would prescribe the rate for that year.²

² The Board previously prescribed the rate for 2014 in this docket in a decision served August 19, 2016.

DISCUSSION AND CONCLUSIONS

The 2015 URCS data is now available.³ Consistent with the May 14 Decision, the Board will reinstitute the rate prescription for 2015, and the parties may calculate the maximum lawful rate the carriers could charge, which the Board previously held in November 2011 amounted to 180% of the variable cost of providing service.

Due to the unique circumstance of this case, the Board's broad discretion to fashion appropriate equitable remedies for violations of 49 U.S.C. § 11323, and its "authority to take equitable actions 'that are legitimate, reasonable and directly adjunct to the [agency's] explicit statutory power,'" ⁴ the Board will reinstitute the rate prescription for 2015, but keep this proceeding open and in abeyance regarding the incorporation of the asset markup into the rate prescription. When the 2016 URCS data including the asset markup becomes available, the Board will prescribe the rate for that year. Once the asset markup is fully incorporated, and the 2016 BNSF URCS is available, the Board will reinstitute the rate prescription for 2017-2018, which can be indexed from the 2016 data or the most recently available data at the appropriate time.

As stated in the May 14 Decision, the parties are instructed to continue to keep account of the amounts paid while the proceeding is in abeyance. See also January 2012 Decision, slip op. at 3 (noting that the parties came to an agreement about handling charges pending a final decision in the reopened proceeding). As always, the parties may confer and agree upon an alternative approach to finalizing the rate prescription in this proceeding for 2016-2018.

It is ordered:

1. The parties are directed to use the 2015 URCS to calculate the rate prescription for 2015, as described above.

2. The prescriptive effect of the rate prescription in this proceeding is reinstituted through 2015. The prescriptive effect of the prior rate order remains temporarily lifted for 2016-2018. Each party is instructed to continue to keep account of amounts paid during the pendency of the reopening—in accordance with the parties' agreement to make the party/ies whole at the conclusion of this reopening, with respect to the amounts paid during the interim.

³ See Surface Transportation Board, Industry Data>Economic Data: URCS, <http://www.stb.gov/stb/industry/urcs.html>.

⁴ WCTL Order, slip op. at 28 (quoting ICC v. Am. Trucking Ass'n, 467 U.S. 354, 365 (1984) (internal quotations and citations omitted); citing 49 U.S.C. § 721(a) (subsequently redesignated as 49 U.S.C. § 1321(a)); Zola v. ICC, 889 F.2d 508, 516 (3d Cir. 1989)).

3. This proceeding is held in abeyance, regarding the transitional incorporation of the asset markup, as described above.

4. This decision will be effective on its service date.

By the Board, Board Members Begeman and Miller.